

Sines, et al. v. Kessler, et al., 3:17CV72, 10/18/2021

1 UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF VIRGINIA
3 CHARLOTTESVILLE DIVISION

4 ELIZABETH SINES, ET AL., CIVIL CASE NO.: 3:17CV72
5 OCTOBER 18, 2021, 9:30 AM
6 PRETRIAL CONFERENCE VIA ZOOM

7 Plaintiffs,
8 vs.

9 Before:
10 HONORABLE NORMAN K. MOON
11 UNITED STATES DISTRICT JUDGE
12 JASON KESSLER, ET AL., WESTERN DISTRICT OF VIRGINIA

13 Defendants.

11 APPEARANCES:

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1 (Proceedings commenced, 9:30 AM)

2 THE COURT: All right. You may call the case, if
3 you're ready.

4 THE CLERK: Yes, Your Honor. This is Civil Action
5 Number 3:17CV72; Sines and others versus Kessler and others.

6 THE COURT: Are the plaintiffs ready?

7 MS. DUNN: We are, Your Honor.

8 THE COURT: Are the defendants ready?

9 MR. KOLENICH: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. SMITH: Yes, Your Honor.

12 THE COURT: Of course, all of them are not here. But
13 before we begin, I will remind everyone that under Standing
14 Order 2020-12, the Court's prohibition against recording and
15 broadcasting court proceedings remains in force. Attorneys,
16 parties, or staff, or members of the public or press accessing
17 this hearing today may not record or broadcast it.

18 We're here today to hear argument on several motions
19 in limine. The Court has resolved several that were previously
20 set for argument today, but several remain. I would suggest we
21 proceed with any argument in the following order: First
22 hearing argument from the movant, then responses before
23 proceeding to the next motion.

24 First we'll hear Defendants Kessler, Damigo, and
25 Identity Evropa's motion in limine and request for judicial

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1 notice, that's Docket 1148; secondly, plaintiffs' motion in
2 limine to preclude certain evidence of James Fields's
3 communication, Docket 1153; and three, plaintiffs' motion to
4 deem authentic certain photos or videos pertaining to Robert
5 Azzmador Ray, Docket 1149.

6 Two other motions previously scheduled will not be
7 heard today. The Court has been informed by the U.S. Marshal
8 Service that Mr. Cantwell is still in transit; therefore, it
9 would make sense to hold off on any argument until later this
10 week on plaintiffs' motions to exclude several of
11 Mr. Cantwell's trial witnesses.

12 The Court has also been informed this morning that
13 Bryan Jones, representing League of the South, will not attend
14 today's hearing due to scheduling conflicts with other cases.
15 The Court will not hear argument today, therefore, on the
16 League of the South defendant's motion in limine and request
17 for judicial notice. Mr. Jones has said he's willing to rest
18 on his briefing on that issue -- on the issue.

19 Once we are done with argument on the outstanding
20 motions, the Court would like to ask the parties whether they
21 think holding an extra Zoom hearing this week, perhaps
22 Wednesday, could be productive before the final pretrial
23 conference on Friday.

24 All right. We'll hear from -- on Motion 1,
25 Defendants Kessler, Damigo, and IE motion in limine.

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1 MR. KOLENICH: Thank you, Your Honor. Jim Kolenich
2 for those defendants.

3 THE COURT: Okay.

4 MR. KOLENICH: The motion in limine requests that the
5 Court take judicial notice of search warrant affidavits and the
6 accompanying search warrants that we only recently became aware
7 of for the reason that these warrants were sealed, and the case
8 number is listed in the motion. These warrants were issued
9 relative to two named individuals, Miles and Moores -- I
10 believe that's Lindsey Moores and Sarah Miles -- who are known
11 to Defendant Kessler from prior political events to be what are
12 called the anti-fascists. The search warrant affidavits filed
13 by FBI agents indicate that the agents reviewed video and
14 requested search warrants because they believed there was
15 probable cause to believe that these two individuals, these two
16 anti-fascists, had committed criminal offenses in
17 Charlottesville on August -- I believe it's the 12th, limited
18 to August 12th, 2017.

19 Now, the defense -- or I'm sorry, the plaintiffs have
20 objected on the grounds that police reports ordinarily are
21 excluded -- the contents of the reports -- on hearsay grounds;
22 however, in order to be hearsay, of course, the statement has
23 to be introduced for the truth of the matter asserted. And
24 that isn't what defense seeks to use these warrants for.
25 Rather, we simply seek to show that an information was provided

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1 to the government -- in this case, Magistrate Judge Hoppe --
2 and the magistrate judge found it demonstrated probable cause
3 under the law to believe the criminal activity may have been
4 committed by these two people. Therefore, it is not entirely
5 unreasonable the jury shouldn't be denied this information that
6 it was -- that the defendants believed the criminal activity
7 was being engaged in by a certain class of counter protesters
8 on August 12, 2017.

9 So that's the motion for judicial notice, Your Honor.

10 THE COURT: All right.

11 MR. KOLENICH: Sorry. Go ahead, sir.

12 THE COURT: Yes.

13 MR. KOLENICH: Moving on, there are several other
14 parts of the motion.

15 The second motion in limine is brought under federal
16 Rule of Evidence 105, and it deals with the various sanctions
17 that have been issued by the Court on motion of the plaintiffs.
18 And we've -- there are at least three different parties that
19 have been sanctioned. I believe the Court recently issued some
20 sort of sanction against Defendant James Fields.

21 THE COURT: Let me ask you a question: Why isn't
22 that something that's taken care of by a jury instruction?

23 MR. KOLENICH: Sorry, the Evidence Rule 105, Your
24 Honor?

25 THE COURT: Well, I mean, in order to protect the

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1 parties who were not sanctioned from having evidence of the
2 sanction prejudicing the unsanctioned party, why wouldn't --
3 (Unreportable crosstalk).

4 THE COURT: Excuse me?

5 MR. KOLENICH: I think the entire trial is going to
6 be -- you know, as in the complaint, the plaintiffs are given
7 to saying co-conspirator, co-conspirator about just about
8 everybody. They're going to say conspired. You know, I think
9 there is a very realistic danger the jury is going to be left
10 with an incorrect impression that these sanctions -- that the
11 sanctionable misconduct of these parties indicates that they
12 conspired with the particular other defendant.

13 And so this motion -- this part of the motion in
14 limine is an effort to avoid the defense having to object
15 repeatedly every day during the trial to any plaintiff
16 questions or implications regarding the sanctions establishing
17 any facts against the non-sanctioned party. It may be -- I
18 think we do have a proffered jury instruction. And it may be
19 that the plaintiffs don't actually do that, and no objections
20 will be made. But we -- the defense view is that this motion
21 in limine to preclude them would be useful in focusing how they
22 ask their questions and put in their case.

23 THE COURT: Well, it would be a normal procedure for
24 the Court -- when any type of evidence like that is offered,
25 for the Court to immediately instruct the jury that it can only

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1 be used against the party who was sanctioned. I mean, that's
2 not -- that's unusual in trial.

3 MR. KOLENICH: I think the defense would be okay with
4 that, Your Honor.

5 THE COURT: All right. I think that --

6 MR. MILLS: Your Honor, this is David Mills. Sorry,
7 my video is not working.

8 We did, as plaintiffs, propose a jury instruction on
9 this. I do not think actually that Mr. Kolenich's jury
10 instruction proposal included anything for the spillover
11 effect, but we certainly did. The plaintiffs do not oppose
12 that, and actually propose a very specific jury instruction to
13 address this exact issue. So that should resolve this problem.

14 THE COURT: I'm sorry. What's your --

15 MR. MILLS: I'm sorry, this is David Mills for the
16 plaintiffs.

17 THE COURT: Excuse me, but it's not your turn to
18 speak.

19 MR. MILLS: I'm sorry, Your Honor.

20 THE COURT: No, I was trying to cut argument on that
21 issue off. I thought the jury instruction probably resolved
22 it. And if it didn't, I'll allow the plaintiff to speak to it.

23 Go ahead, Mr. Kolenich.

24 MR. KOLENICH: Pursuant to Mr. Mills's
25 representation -- I'm not sure I reviewed that particular jury

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1 instruction -- but if that is accurate, the defense doesn't
2 have any big objection, as long as the Court is making
3 instructions as we go along, as you indicated, and the
4 plaintiffs have proposed an even better jury instruction than
5 defense did. I think that issue would be adequately addressed,
6 Your Honor.

7 THE COURT: All right. Okay. Go ahead with any
8 other argument you're making now.

9 MR. KOLENICH: Thank you, Your Honor.

10 Moving on in the defense motion, we have moved under
11 various evidence -- Rules 401, 402, and 403 -- regarding
12 relatives and friends of the party plaintiffs testifying. I
13 think that the defense responsive pleading was directed at
14 things that this motion doesn't actually ask for. All we're
15 asking for is that the emotional effect on those witnesses of
16 seeing the damages to the plaintiffs be excluded as evidence.
17 I think that the witnesses would just sort of naturally talk
18 about how they felt seeing their family members suffer as a
19 result of the damages. This motion -- this part of the motion
20 seeks to exclude that testimony.

21 THE COURT: Okay. All right. Anything else?

22 MR. KOLENICH: We have terms. We have a motion
23 directed against terms. There are some example terms:
24 "Conspiracy, racial animus," and so forth. The motion is
25 directed at the sort of terms resulting in an emotional

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1 reaction in the jury. So if they're constantly calling the
2 plaintiffs Nazi, racists, and so forth prior to that becoming
3 an established fact in the trial, we -- the defense asserts
4 that that would be prejudicial under 403 to the defendants.

5 So we're just seeking a motion ahead of time to --
6 and then the plaintiffs have a similar motion regarding file
7 names and titles that they filed recently. We're just seeking
8 to restrict the rhetoric coming I guess from counsel, but also
9 from the party plaintiffs. If they're going to constantly say
10 racist, racist, racist before it's actually been established
11 that there's a racial animus in any particular defendant, it's
12 our assertion that that is prejudicial.

13 And I believe the last part of my motion, Your Honor,
14 is directed to the testimony of the experts. It's a motion in
15 limine seeking an order that the plaintiffs will observe the
16 restrictions that were discussed at the motion hearing
17 regarding these experts on December 17th, 2021. I'm sorry --

18 THE COURT: Didn't we resolve that at that time?

19 MR. KOLENICH: I think we did, Your Honor. It just
20 seemed to me the better procedure was to bring it in a motion
21 in limine that -- more or less that the Court is aware of what
22 we resolved in December of 2020, and will enforce it upon the
23 plaintiffs.

24 THE COURT: I assume the plaintiffs will follow the
25 previous order and do what it said.

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1 All right. Anything else?

2 MR. KOLENICH: No, Your Honor. I think that covers
3 it. Thank you.

4 THE COURT: All right. Who is going to respond for
5 the plaintiff?

6 MR. ISAACSON: Your Honor, this is Bill Isaacson from
7 Paul Weiss for the plaintiffs. I can begin with the issue that
8 Mr. Kolenich began with, the judicial notice of the search
9 warrants and search warrant affidavits.

10 They're seeking that the Court tell the jury that
11 there is a search warrant based on probable cause, and also
12 that the Court tell the jury they are to take judicial notice
13 of long affidavits about three individuals who these search
14 warrants are two years after the events of Charlottesville.
15 And they want to argue that probable cause and the facts in
16 those affidavits are a basis for their state of mind two years
17 prior to the search warrants.

18 These don't meet the standards for judicial notice.
19 Judicial notice is obviously different from evidence because
20 the Court is telling the jury what has been determined by the
21 Court. It is extraordinary for search warrants all over
22 America to all of a sudden be read to juries to say -- in cases
23 where people want to say there is probable cause for something.

24 That is against the standards for judicial notice
25 because, first, the search warrant affidavits themselves are

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1 inadmissible evidence. Both the affidavits and the information
2 within them that are hearsay and otherwise don't meet the rules
3 of evidence, including authentication of photos and materials
4 in them. Judicial notice is not an excuse for evading the
5 rules of evidence and bringing in what otherwise couldn't be
6 brought in.

7 The second is in order to have judicial notice is the
8 facts have to be subject to no reasonable dispute. And by
9 definition, an affidavit in a search warrant is subject to
10 reasonable dispute because the people on the other side would
11 dispute those facts. And plaintiffs in this case would also
12 subject them, if they were to be brought into evidence, to
13 cross-examination and to whatever replies with evidence that we
14 thought were appropriate. It's not appropriate for the
15 defendants to be asking for the Court to tip the scales by
16 declaring certain things to have been found, and therefore that
17 the jury is supposed to take judicial notice.

18 THE COURT: Well, let's -- you can stop. The search
19 warrants are not -- the Court cannot take judicial notice of
20 those. It's not proper. I think that would be in the realm of
21 almost black letter law. I mean, it's just not -- it just
22 wouldn't be -- it just doesn't fit the criteria.

23 MR. ISAACSON: Then I will pass the argument on to my
24 colleagues.

25 THE COURT: All right.

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1 MR. MILLS: Your Honor, this is David Mills. I can
2 address the issue -- although I think it may be resolved -- the
3 issue of the spillover effect instruction. I think I heard
4 Mr. Kolenich say that he would be fine with the instruction.
5 And I would just read to you the instruction we proposed, which
6 is to instruct the jury that: You are cautioned, however, that
7 each party is entitled to have the case decided solely on the
8 evidence that applies to that party. The facts being
9 established which I just listed are admitted only as to
10 Defendants Elliott Kline and Robert Azzmador Ray respectively;
11 thus, taking those facts as true for this case as to Elliott
12 Kline and Robert Azzmador Ray does not relieve plaintiffs of
13 their burden to prove by a preponderance of the evidence the
14 conduct committed by the other defendants in this case.

15 That's the instruction that we propose, which is
16 consistent with the Fourth Circuit's decision in *United States*
17 *versus Osuji*.

18 THE COURT: Mr. Kolenich, any problem with that?

19 MR. KOLENICH: Not necessarily, Your Honor. I
20 think -- I think we may have some language in our proposed
21 instructions, which I apologize, I don't have before me this
22 morning.

23 THE COURT: Well, you can let us know, and I'll -- I
24 mean, it seems to be in the right direction.

25 MR. KOLENICH: It's a very strong instruction, Your

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1 Honor. Yeah, I don't have any problem with what he just read
2 in and of itself.

3 THE COURT: Okay. Next? Mr. Mills, are you
4 finished?

5 MR. MILLS: Yes, I am finished with that, and I pass
6 the torch to Caitlin Munley.

7 THE COURT: Any further argument, then, on the
8 defendants' motion?

9 MS. MUNLEY: Yes, Your Honor.

10 MS. DUNN: Yes, Your Honor. I think the plaintiffs'
11 counsel who is speaking is on mute.

12 MS. MUNLEY: I apologize. I was on mute.

13 Good morning, Your Honor. I will be addressing the
14 two remaining issues in the motion regarding the introduction
15 of emotional distress of non-witnesses [sic], and the use of
16 the terms "conspiracy" and "racial animus."

17 It sounds like defendants agree with us that we don't
18 intend to introduce any evidence of emotional distress of
19 non-parties, except we do want to point out that we think
20 defendants' motion is overly broad, and it places due intent to
21 introduce non-party testimony regarding two things:

22 Plaintiffs' emotional distress as a result of defendants'
23 conduct and nonparty witnesses' testimony about how they felt
24 or reacted to events they witnessed firsthand. We think both
25 of these are probative and relevant and not unduly prejudicial.

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1 THE COURT: You'll need to repeat that. I'm having a
2 little trouble hearing -- understanding you.

3 MS. MUNLEY: I apologize.

4 So plaintiffs do intend to introduce non-party
5 testimony regarding the emotional distress that plaintiffs
6 experienced as a result of defendants' conduct. It sounds like
7 defendants are trying to limit those non-party witnesses
8 from -- from testifying at all about their personal reactions
9 to plaintiffs' injuries. These are -- these are plaintiffs'
10 family members. They are plaintiffs' friends. It would
11 undermine their credibility if they were not able to discuss at
12 all the way that this affected plaintiffs and kind of the
13 emotional distress. The other thing is that this testimony is
14 corroborative of plaintiffs' injuries, and it has evidentiary
15 value for plaintiffs' emotional distress claims and damages.
16 So we would say that this -- the type of testimony that it
17 seems like the defendants are trying to preclude is actually
18 both relevant and probative.

19 THE COURT: Well, what I heard them objecting to was
20 the witness saying -- the witness whom you would call to
21 testify as to the plaintiffs' emotional distress telling -- the
22 witness relating how the witness was distressed emotionally, as
23 opposed to --

24 MS. MUNLEY: No, Your Honor.

25 THE COURT: I don't see that there is any

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1 disagreement. I don't see why -- say if one of the plaintiffs'
2 sisters were to say, I was very distressed when I heard about
3 my sister being in the accident, I don't think that's
4 particularly -- I don't see why that would be relevant or
5 admissible.

6 MS. MUNLEY: That's correct. We just don't want
7 defendants to attempt to exclude any emotional reaction from
8 plaintiffs' family or friends from witnessing either
9 plaintiffs' injuries, or, if they were present, any kind of
10 emotional reaction that they had to defendants' conduct.

11 THE COURT: Well, let me get this straight now. Say
12 if you call one of the plaintiffs' mothers, you would -- do you
13 anticipate that the mother would testify as to her -- the
14 mother's distress?

15 MS. MUNLEY: No. But we would assume that the mother
16 would have a visible emotional reaction that the jury would be
17 able to see. And it is --

18 THE COURT: Okay. Well, that's -- I mean, as long as
19 it's not obviously feigned, I would -- I don't know how -- the
20 Court can't limit people's emotional reactions. But as I
21 understood, what the defendant would be objecting to is the
22 mother hypothetically -- the hypothetical mother saying how she
23 was distressed at her daughter's experience, which I think
24 would be inadmissible.

25 MS. MUNLEY: Correct. And we don't intend to

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1 introduce that testimony.

2 THE COURT: All right. Are you satisfied with that,
3 Mr. Kolenich?

4 MR. KOLENICH: Yes, Your Honor.

5 THE COURT: Okay. All right. Was there anything
6 else, then?

7 MS. MUNLEY: Yes, Your Honor.

8 I believe Mr. Kolenich also moved to preclude
9 plaintiffs from using the terms "conspiracy, racial animus," or
10 any similar term or concept in either testimony, argument, or
11 questioning. Plaintiffs believe that this request is wildly
12 overbroad; it would be incredibly impractical; and it's
13 premature for a motion in limine.

14 First, defendants seek to limit the use of the terms
15 "conspiracy, racial animus," and any similar term or concept,
16 which would make questioning and testimony almost impossible in
17 this case. Mr. Kolenich demonstrated the issues with this
18 motion in his argument in that he talked about a number of
19 terms that were not even mentioned in his motion. Because the
20 defendants do not define what they mean by "any similar term or
21 concept," there would be an enormous waste of judicial
22 resources and the parties' time and energy in trying to figure
23 out what language they were allowed to use at any point in the
24 trial. It would be extremely inefficient and it would be
25 extremely confusing for the jury. Plaintiffs are seeking to

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1 prove a conspiracy motivated by racial animus, and it would be
2 absurd for them to have to try to do so without using any words
3 relevant to conspiracy or racial animus.

4 THE COURT: I think the limitation would be you may
5 not call one of the defendants a racist in maybe the opening
6 statement or during the witness's testimony. You may not refer
7 to the person as a racist. Now, what you can certainly in your
8 opening statement say that you intend to prove that racial
9 animus was a motivating factor. I mean, that -- I don't see
10 any way you get around that. You have to talk about -- I mean,
11 if it is -- the main count is a conspiracy. So you have to
12 talk about -- use the term "conspiracy" when you discuss the
13 issues in the case.

14 I think the -- sort of like in a criminal case, you
15 don't start out -- it's argumentive to stand -- you know, for
16 the prosecutor to start out pointing to the defendant: Now,
17 the defendant is your rapist. I mean, generally you don't --
18 you know, that's -- you have to prove -- that's a matter of
19 proof. And it's argumentive to start out calling -- I mean,
20 plaintiffs shouldn't call the defendants racist in their
21 opening statement. I mean, they can say what they're seeking
22 to prove, but not the term -- pejorative terms themselves are
23 not normally appropriate in an opening statement or when you
24 have the witness on the stand.

25 MS. MUNLEY: And Your Honor, we don't disagree with

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1 that. We just think this motion in itself is a premature
2 motion. The more workable solution to the issues the
3 defendants raise is for --

4 THE COURT: Mr. Kolenich, I mean, you heard what I
5 said. It's hard to rule on something like that. I told the
6 plaintiffs what my opinion is. And, of course, if you have to
7 object to it, I'll try to see to it you don't have to object
8 but once. And I will try to police any ruling that I make so
9 that you're not having to hop up and down all the time, but I
10 don't see how you avoid the terms coming in at appropriate
11 times.

12 MR. KOLENICH: Thank you, Your Honor. Yes, as
13 modified by plaintiffs' argument and the Court's observation, I
14 guess the motion as written is just a little bit overbroad and
15 unworkable. So I understand what the Court is saying and have
16 no objection.

17 THE COURT: All right. Thank you.

18 Okay. Were there any other defendants -- are those
19 defendants' motions?

20 MR. SMITH: Your Honor, Josh Smith. I represent
21 David Matthew Parrott, Matthew Heimbach, and Traditionalist
22 Worker Party.

23 I know it's, I suppose, not my turn to speak. I just
24 wanted to sort of point out that one of the reasons why I
25 attended the hearing this morning was that I wanted to bring up

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1 several matters with the Court that I haven't had an
2 opportunity to bring up with the Court yet because I'm fairly
3 new to the case.

4 THE COURT: Well, why don't we go through the agenda.

5 MR. SMITH: Of course. I only said that just
6 because --

7 THE COURT: I'll allow you to speak at the end,
8 afterwards.

9 MR. SMITH: Fantastic. That's great.

10 THE COURT: All right. We have plaintiffs' motion in
11 limine to preclude James Fields -- certain of James Fields's
12 communications, 1153. Who is --

13 MR. SANCHEZ: Good morning, Your Honor. Giovanni
14 Sanchez, Paul Weiss, on behalf of the plaintiffs. I will be
15 addressing that motion.

16 THE COURT: All right.

17 MR. SANCHEZ: Your Honor, as you know, in that motion
18 we seek to preclude defendants from offering evidence that
19 Detective Young or any other law enforcement officers did not
20 find communications between Defendant Fields and other people
21 who attended or organized UTR. Now, in their response to that
22 motion, defendants did not dispute that that's a form of
23 negative evidence. They also did not dispute that it would be
24 inadmissible if they could not establish the proper foundation.
25 Their only main argument is that at this time it's premature

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1 for the Court to rule on that issue. And we respectfully
2 submit, Your Honor, that the record, as it stands today, is
3 more than clear that they will be unable to establish a proper
4 foundation for that testimony. And in particular, I want to
5 focus on three aspects why that's true.

6 The first reason that's true is that no law
7 enforcement officer, including Young, could have known the
8 identity of all the relevant people. Now, we know that must be
9 true because not only would it be infeasible for them to know
10 all the people who attended the rally; but more specifically,
11 they wouldn't even know particular subgroups that are very
12 important and central to the case. For example, and probably
13 most notably, they wouldn't know the identity of the membership
14 of Vanguard. And we know that must be the case because the
15 leadership of Vanguard, such as Hopper, testified under oath
16 that he himself did not know the identity of the members. And
17 that was, as the Court has previously recognized, a deliberate
18 tactic they use to shroud their membership's secrecy. Now,
19 that's notable because we know that Defendant Fields marched
20 with Vanguard. He carried their shield. He wore their
21 uniform. That's the first reason.

22 The second reason is that even assuming Detective
23 Young knew some of the relevant identities, there is nothing
24 beyond a speculative chance that he would know all of the
25 aliases and user names. Now, this is a very important point

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1 because the record is peppered with examples of how multiple
2 defendants and conspirators in the case used an array of
3 different aliases as they were engaging one another on
4 different digital media platforms. As just one example, Fields
5 himself had half a dozen different aliases that he was using
6 online. And often those aliases were not tied in any obvious
7 way to their legal or given name. For example, Fields's
8 Instagram handle was BigBoss1337.

9 Now, this issue, this issue about the aliases is
10 further compounded by the problem we have that we became aware
11 of through the testimony of Rousseau, another leader of
12 Vanguard. And that's that often they would use digital
13 profiles that would expire within weeks. Now, they did this
14 often to evade a lot of the bands they would get on certain
15 platforms. So it's very possible that not only would he not
16 know the different aliases because he couldn't tie them to
17 particular identities, but also because the identities just
18 might have expired after a given time. That's the second
19 reason.

20 The third reason is that even assuming Detective
21 Young might have become aware of some of the identities and
22 might have been able to tie those identities to some of the
23 aliases, there's a problem about the use of auto-delete
24 features. And this is again coming from sworn testimony from
25 Vanguard's leadership, and that we know that it was a practice

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1 of Vanguard -- and perhaps of other defendants -- that when
2 they would use certain messaging platforms, they would engage
3 what's called an auto-delete feature. And the auto-delete
4 feature would just make messages go away, would erase messages
5 sometimes within a period as short as 12 hours. And so for
6 spans of weeks and months of when messages were exchanged on
7 certain platforms, they would have been erased and no one would
8 access to them, not even law enforcement, as far as we're
9 aware.

10 Now, each of those three reasons we think is
11 sufficient to show that as the record stands today, they have
12 not established a proper foundation. But there's one more
13 point that I think kind of underscores all of this, is that
14 each of those points assumes that a focus of law enforcement's
15 investigation was tying Fields to the conspirators in this
16 case. And plaintiffs have reason to believe that that was
17 never a central focus of the investigation. Based on my
18 colleagues' interactions with law enforcement, we believe it's
19 fair to say that those connections were never fully explored to
20 the extent that they would have been explored in this case.
21 And so in some sense there's just a fundamental misalignment
22 between the investigation that law enforcement officials
23 conducted and the facts that are relevant to establish the
24 foundation for that testimony in this case.

25 So for each of those reasons, we think they cannot

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1 establish a proper foundation. Now, even assuming they
2 establish -- they are able to establish some minimal foundation
3 for some limited testimony, we think in that case they should
4 still be precluded under Rule 403. The most illuminating case
5 on that issue is the *Forrest* case in the Third Circuit, which
6 we cited in our brief. And because I think it will be helpful,
7 I'd like to dive into the facts of that case just a little bit,
8 if Your Honor would allow it.

9 So in that case, in the *Forrest* case, the key issue
10 was whether or not there was a design defect that injured the
11 plaintiffs. And the witnesses that the defendants intended to
12 use in that case had decades of experience with the machine
13 that injured the plaintiff. They knew its ins and outs. They
14 worked with it every day for over 30 years. They had more than
15 sufficient knowledge about that one particular machine so that
16 they could speak on it with -- you know, consistent with the
17 rules of evidence. But what the Court in *Forrest* recognized is
18 that one machine was just a small part of the relevant universe
19 of evidence. The relevant universe of evidence included all of
20 the machines that had been designed. And so the problem with
21 that testimony is that it would appear to the jury very
22 concrete, very tangible, highly probative; but really that was
23 misleading and that was confusing, and it would cause them to
24 generalize and speculate in a way the rules of evidence do not
25 permit them.

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1 And we think there's a similar problem here, because
2 to the extent they can establish some minimal foundation for
3 the evidence that came from the phone, that phone is just one
4 small piece of all of the relevant communications that might
5 tie Fields to the conspiracy. Obviously, there is other
6 devices. There is the possibility of digital burner phones,
7 which I talked about earlier. There is the possibility of
8 messages being erased. And even putting all of the digital
9 aspects aside, there is the ample communication that happened
10 in person at UTR that there is no dispute that law enforcement
11 officers do not have the full array of evidence regarding those
12 communications.

13 So in the same way that the machine -- the testimony
14 in *Forrest* would have been about a single machine, and would
15 have led the jury to be misled based on that single small part
16 of the evidence, the same applies here. The jury would be
17 confused about Detective Young's testimony about one specific
18 device when there's a host of other communications that are
19 relevant, including communications that happened at UTR itself
20 where Fields very likely might have joined the conspiracy.

21 So for all those reasons, Your Honor, we think this
22 evidence should be excluded both because defendants cannot
23 offer -- and I invite them to proffer some reason where they
24 could establish foundation; I don't think they will be able
25 to -- proper foundation for this testimony. But again, even if

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1 they could, Your Honor, we think it should be precluded under
2 403.

3 THE COURT: All right, sir.

4 Who will respond?

5 MR. KOLENICH: Your Honor, Jim Kolenich for the
6 defendants -- well, for my clients, Your Honor.

7 All right. So the plaintiffs -- this motion is
8 seeking to exclude, as I understand it, Detective Young in
9 total, that we won't even be able to present him as a witness
10 at all. The case that plaintiff relies on that was just
11 discussed ably by counsel didn't mention the fact that the
12 *Forrest* case did not exclude this testimony pretrial, but
13 allowed the parties in that action to try to establish the
14 foundation at trial. And that, as noted, is our entire
15 presentation and response --

16 THE COURT: Okay. Well, I think we can sort of stop
17 the argument on it. At this point, I have -- it does not
18 appear that the foundation has been laid, but what I would rule
19 is that this shouldn't be mentioned in opening statement unless
20 you present something to the Court that you can lay a proper
21 foundation, or if you proceed -- if you intend to call a
22 witness to testify, that you take it up with the Court first,
23 that there be -- and show that the foundation can be laid.

24 What is the question -- ultimate question you would
25 ask the witness?

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1 MR. KOLENICH: Your Honor, Detective Young testified
2 that he found no evidence linking James Fields to anybody
3 else -- anybody else, whether defendants in this case or not,
4 as to his criminal act.

5 Now, the plaintiffs well observed that he -- this
6 argument about the universe of possible evidence is not a
7 completely off-base argument. I believe Detective Young did
8 testify at deposition that other electronic devices were
9 acquired by other law enforcement agencies, specifically
10 federal law enforcement. The detective also testified that
11 federal law enforcement never told him that they found any
12 evidence of a conspiracy on those other devices.

13 So we would be calling him for the limited purpose of
14 the stuff he did look at. Did you find any conspiracy? And it
15 is a fact of the case, and it is the defense position, that it
16 is prejudicial to the defense to deny the jury access to this
17 fact, that the police did not charge anybody else in connection
18 with James Fields's criminal act. Now, admittedly, that's
19 potentially a little bit more negative evidence. Ordinarily
20 law enforcement inaction would not be admissible as to effect,
21 but in this case law enforcement took action, both sovereigns,
22 both state and federal charged Fields with murder, convicted
23 him. If memory served, he's sentenced to more than 400 years
24 in prison. And they didn't charge anybody else. This is a
25 fact that is relevant and should be admissible in this case.

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1 So no, we're not calling Detective Young to say that
2 there is no evidence, and that his investigation establishes
3 there is no evidence of communication or conspiratorial
4 communications with anybody else or any other defendant in this
5 case. We are calling him for the limited purpose of what he
6 certainly observed and can testify to. He didn't find any.
7 The FBI told him they didn't find any, or at least never told
8 him that they found any. And neither of these prosecutorial
9 authorities ever charged anybody else with a crime, not so much
10 as littering, in relation to James Fields's actions. I think
11 the jury should be able to hear that, Your Honor, at some
12 point.

13 Certainly it's absolutely inaccurate that there is no
14 foundation for that right now as we speak in the wake of the
15 deposition. The fact of the matter is plaintiffs didn't ask
16 any of these questions to this witness. They wanted to rely on
17 this argument instead. However, I understand the Court wants a
18 proffer, and that's all the proffer we can make. I think we
19 should be allowed to mention at opening that there is nobody
20 else charged with a crime. We object to a court order that
21 precludes us from doing that. But the remainder of it I think
22 is understood and sort of ordinary procedure that --

23 THE COURT: All right. Well, okay. The ruling at
24 this time, though, is that there is no proper foundation laid.
25 An opinion that based on what other people may have told him or

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1 what other people didn't tell him, I don't -- I don't see any
2 way that that is admissible.

3 MR. KOLENICH: Well, can we at least say, Your Honor,
4 that no one else was charged with a crime at opening?

5 THE COURT: Well, that's not the issue in this
6 particular case. I mean, a crime, of course, the burden of
7 proof is beyond a reasonable doubt. And there are lots of
8 decisions that go into whether to prosecute someone or not.
9 And I think you're getting into the realm of speculation and
10 all sorts of reasons why someone was or was not prosecuted.
11 Fields was sort of the obvious person to be prosecuted, but I
12 don't -- I think it's sort of going down a rabbit trail when
13 you start talking about no one else was prosecuted. Then we
14 have to get into why, and speculating on why or why not. And
15 so I don't think it's -- I don't think it's proper, and I rule
16 that it would not be admissible.

17 MR. SMITH: Isn't it okay for the jury to speculate,
18 Your Honor, on that, just by saying -- you know, isn't it
19 proper for the jury to say, well, there was no one else
20 charged, so there must not have been any kind of conspiracy,
21 because if -- if the police would have found evidence of it,
22 they would have charged somebody. I think in a case like this
23 with this much publicity --

24 THE COURT: Well, I --

25 MR. KOLENICH: I'm sorry, Your Honor.

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1 THE COURT: I'm sorry, who's speaking?

2 MR. SMITH: Oh, Josh Smith. I don't -- I have --

3 THE COURT: You know, I mean, what the jury does in
4 its own mind, God only knows. I don't think it's proper
5 evidence.

6 MR. SMITH: It's a high publicity case.

7 THE COURT: If it comes in, then you can -- I mean,
8 you certainly can argue, well, no one else was charged with a
9 crime in this particular case, and therefore there was no
10 conspiracy. That would -- that doesn't follow. I mean, a
11 criminal conspiracy is entirely a different matter.

12 MR. SMITH: Well, it's a very high publicity case.

13 THE COURT: You have to prove it beyond a reasonable
14 doubt. And there are charging decisions made by prosecutors
15 all the time that -- you know, we have situations that come up
16 and prosecutors don't charge everyone. And we get -- we would
17 get off -- off into left field trying to handle why the
18 prosecutors may not have charged someone else.

19 MR. SMITH: Your Honor, in a case like this with this
20 much publicity, it seems like if there was any even inkling --

21 THE COURT: Well, there's just no legal merit to that
22 argument, sir, that a case with this much publicity. That has
23 nothing to do with whether this is admissible. I just have to
24 rule that it's not admissible, okay?

25 All right. Anything else?

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1 MR. SANCHEZ: That's all for this motion, Your Honor.

2 I'm also presenting argument on the motion regarding Ray, the
3 motion to authenticate the photos and videos regarding
4 Defendant Ray. If you want, I can move on to that motion.

5 THE COURT: All right. Go ahead.

6 MR. SANCHEZ: As to that motion, Your Honor, we
7 just --

8 THE COURT: Is there any opposition to that motion,
9 though, at this point?

10 MR. SANCHEZ: That's the point I was just about to
11 make, that it's unopposed; and for that reason, we're willing
12 to rest on our brief, unless the Court has any specific
13 questions we'd be more than happy to address.

14 THE COURT: Okay. I felt it was not opposed.

15 MR. SANCHEZ: That's correct.

16 THE COURT: Okay. Anything else, then, from the
17 plaintiff?

18 MR. SANCHEZ: That's all for me, Your Honor. I think
19 my colleagues may have more arguments, but that's all for me.

20 THE COURT: Okay. Did the plaintiff have any other
21 argument?

22 All right. If not, Mr. Smith, I'll entertain
23 anything you wanted to bring up.

24 MR. SMITH: Yes, thank you, Your Honor. So there
25 were -- so I'm fairly new to the case. I've only been on for

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1 about six weeks. So I'm in the process of catching up. It's
2 been -- you know, it's been a lot of work to get up to speed
3 with -- at least, you know, to the degree that I would like to
4 be. So I may be running behind on a few things. I'll make the
5 necessary motions to file certain things late, if -- but --
6 which brings me to my first point, actually. I was going to
7 ask the Court if it would be okay if David Matthew Parrott,
8 Matthew Heimbach, and Traditionalist Worker Party presented
9 their case in chief last in the order of defendants.

10 THE COURT: What I would say normally, if the
11 defendants can get together and decide the order in which they
12 wish to present their case and their argument, that's fine with
13 the Court; however, there being no agreement, I would normally
14 take the list of defendants in the order that they are sued and
15 let it proceed that way, if I were making the decision.

16 MS. DUNN: Your Honor, this is Ms. Dunn for the
17 plaintiffs. I have something to say that might inform this
18 discussion and reorient it in an important way, if I may.

19 THE COURT: All right.

20 MS. DUNN: Your Honor and Mr. Smith, I think as
21 Mr. Smith is aware, plaintiffs plan to call his clients in our
22 case in chief, because in order to prove our case, we need to
23 call the defendants adversely. And so I think Mr. Smith's
24 question begs a different question, which is whether he will
25 put on his direct examination of his clients when we call his

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1 clients in our case in chief. It doesn't matter to us whether
2 Mr. Heimbach and Mr. Parrott appear twice, once in our case in
3 chief and once in Mr. Smith's. And, of course, that order is
4 up to Mr. Smith and the defendants and the Court. But just so
5 everyone is aware, we do, and we must, in order to prove our
6 case, have to call his clients adversely.

7 THE COURT: All right. Okay. Mr. Smith?

8 MR. SMITH: You know, that sounds like an excellent
9 time-saving idea. And I think under normal circumstances if I
10 had been on the case longer, that might be something that would
11 be beneficial. Here I think it's probably best if the
12 plaintiffs call my clients adversely, and then I still examine
13 them -- conduct direct examination of them in my clients' case
14 in chief so that they can tell their story in an appropriate
15 way at an appropriate time for the jury.

16 THE COURT: All right. I mean, that's --

17 MR. SMITH: As Your Honor said, I can talk to the
18 other defendants about it. I didn't know if the Court was --
19 if the Court wanted something like that or if it was just going
20 to set the order.

21 THE COURT: I try to let you try your case. If
22 there's no objection to anything, I don't interfere.

23 MR. SMITH: So of course this is premature anyway.
24 So I'm sorry about that. That does take care of that.

25 THE COURT: All right.

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1 MR. SMITH: So there was an emergency motion that we
2 put before the Court asking for a protective order to preclude
3 extrajudicial statements by parties, their counsel, and a
4 particular organization that's funding this litigation. Now, I
5 suppose it's possible that the motion got lost in the slew of
6 motions that Christopher Cantwell filed on the docket and -- or
7 something. I think that the thing that we had feared in that
8 motion, that there was going to be this online rally that IFA
9 --

10 THE COURT: Excuse me. On the motion you just spoke
11 of, I think that was referred to Judge Hoppe. That may be
12 something -- I don't know whether he's ruled on it or not.

13 MR. SMITH: Yeah, I don't think there's been a ruling
14 on it yet, Your Honor. I was just sort of updating the Court.
15 They had this rally. My clients -- IFA committed defamation
16 per se against my clients. She said that they were continuing
17 to -- that the defendants were, quote, continuing to threaten
18 or continued to threaten their team, meaning I assume
19 plaintiffs' counsel or somebody. What they alleged was a
20 crime. It's completely untrue. It's defamation per se. And
21 it's exactly what we had feared. It contaminates the jury
22 pool. It's wildly inappropriate. It's actionable legally.
23 This organization, again, funds this litigation. They
24 shouldn't be making statements like that and attempting to
25 prejudice potential jurors, especially with a trial of -- you

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1 know, so much has gone into this trial, it's been going on for
2 so long, to endanger it like that --

3 THE COURT: What's the plaintiffs' position
4 regarding --

5 MR. SMITH: Well, IFA has put in --

6 MS. DUNN: Your Honor --

7 THE COURT: Hold on. Let me see if there is any
8 argument about it first. Who's speaking for the plaintiff?

9 MS. DUNN: Your Honor, this is Karen Dunn for the
10 plaintiffs. There was an opposition to Mr. Smith's motion
11 filed by attorneys for IFA, who are not on this phone call.
12 IFA is a separate organization that has its own counsel. Their
13 counsel's name is Mr. Andrew Celli. He has filed with the
14 Court. I presume that opposition went to Judge Hoppe. And my
15 recommendation would be to put this over until that counsel can
16 be on the phone and properly handle the opposition.

17 THE COURT: All right. Well, it does -- if the
18 plaintiffs are being threatened by anyone, they should be
19 reporting it to the FBI or the Marshals. It shouldn't be --
20 they shouldn't be calling someone else and someone else putting
21 out a press release on it. It ought to be handled.

22 MR. SMITH: That's why we asked for a protective
23 order.

24 MS. DUNN: We agree, Your Honor.

25 THE COURT: With Mr. Smith, it would be highly

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1 inappropriate for those kind of -- and if someone is involved
2 heavily in the case, whether they are a party or not, they
3 shouldn't be -- shouldn't be doing that.

4 MS. DUNN: We understand and agree, Your Honor.

5 THE COURT: All right. Mr. Smith, anything else?

6 MR. SMITH: So I think that another issue that I had
7 written down here was that the Court recently made a decision
8 on the Heaphy reports. And I was going to ask the Court if it
9 would like to reconsider that in light of the residual
10 exception to the hearsay rule, which doesn't appear to have
11 been discussed in the Court's opinion. I'm not sure if it was
12 raised by other -- if it was raised by other defendants, but I
13 would like the opportunity to raise it with the Court.

14 The residual -- this really seems like a case where
15 the residual exception fits quite well. This is the only --
16 the Heaphy report is the only independent report of these
17 events conducted by anyone ever. These are -- this is an
18 extraordinary case, Your Honor, in many ways. And the
19 plaintiffs, of course, admit this all the time. They say this
20 case is extraordinary. The residual --

21 THE COURT: Mr. Smith, look, almost all rulings are
22 susceptible to motions to reconsider. And I think probably
23 what you need to do -- should do is file a short motion and
24 state your position and the Court can rule on it.

25 MR. SMITH: Thank you, Your Honor.

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1 THE COURT: I don't particularly want to get into the
2 argument at this point because I doubt that others are prepared
3 to respond.

4 MR. SMITH: I do know that the plaintiffs had briefed
5 the issue. I believe, if I'm not mistaken, they had included
6 that in their brief on it, which was -- because obviously they
7 had been planning to file that for a while. It was like 15
8 pages or something.

9 I'm trying to -- I'm trying to -- given that there's
10 so little time before trial and I'm really working to get up to
11 speed on everything, I'm trying to limit the number of things I
12 have to write or the length of those things. So I apologize in
13 advance if the things that I end up filing with the Court
14 aren't as lengthy as the Court is used to.

15 THE COURT: Well, lengthiness is not the virtue I'm
16 concerned about. It's just, you know, we have I think by now
17 probably hundreds of motions in this case. And we're trying to
18 move on and take care of them as we can. I note what you're
19 saying. If you want to file a motion to reconsider, it doesn't
20 have to be long.

21 MR. SMITH: Of course, Your Honor.

22 Another thing -- this actually goes to what
23 Mr. Kolenich was saying before -- I don't think that -- there
24 are certain terms that we're talking about -- I believe
25 Mr. Kolenich wanted to limit certain terms like "conspiracy" or

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1 "racial animus" or something like that. There's only --
2 there's a couple -- a couple of terms that -- sort of
3 pejoratives that I'm hearing a lot in this case, and I don't
4 think that they -- they're subjective terms without any kind of
5 coherent, agreed-upon definition. And I don't think they
6 should be used to refer to, well, any of the defendants, but
7 particularly my clients. Those terms are "white supremacist"
8 and "neo-Nazi." It's hard to even understand what those terms
9 mean. But my clients don't identify themselves that way, and I
10 don't think that we should be referring to people by things
11 they don't refer to themselves as.

12 THE COURT: Well, they are pejorative terms.

13 MR. SMITH: They're also inaccurate.

14 THE COURT: I've said that, you know, the plaintiffs
15 should not be referring to these people -- you know, calling
16 someone names. And I think they agreed to that. It's not
17 something in the opening statement you would call somebody a
18 white supremacist or some other -- racist, or anything like
19 that. But it's hard to say you can't bring up a term in a case
20 like this when --

21 MR. SMITH: Yeah, obviously the no conspiracy thing,
22 well, that seems like -- you know, how would you do that in a
23 case where there is allegations of conspiracy? But --

24 THE COURT: I mean, maybe you can correct me, but
25 there are persons who do not take the term -- if they were

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1 called a white supremacist, they wouldn't take that as an
2 insult.

3 MR. SMITH: Well, it's just generally not accurate.
4 I mean, if they refer to themselves that way --

5 THE COURT: But everyone doesn't necessarily take --
6 you know, I mean, I'm reminded of a case that we had where the
7 lawyer told him -- this is a true story -- the lawyer told the
8 a jury, Insulting words depends on who says them, and to whom,
9 and the circumstances. And he said, For instance, you may call
10 me a name I would take as a grievous insult, whereas His Honor
11 would take it as a compliment.

12 You know, that's the way things are. Different
13 people may be proud -- people are proud of their beliefs.

14 MR. SMITH: I mean, usually --

15 THE COURT: What I'm saying, though -- I mean, I've
16 already said it's not appropriate to call somebody a name -- a
17 pejorative name.

18 MR. SMITH: Right. Exactly.

19 THE COURT: That type of thing. And if it happens,
20 you know, object to it. And I will try to police the
21 objections so that you won't be jumping up and down. I don't
22 think the plaintiff intends to do that, or at least they
23 indicate they don't. I think it's not appropriate and --

24 MR. SMITH: Thank you. I'm satisfied with that, Your
25 Honor.

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1 THE COURT: You can't rule out the use of certain
2 words during the trial in all circumstances. It's not
3 appropriate in every circumstance to call somebody a certain
4 name, even though other people wouldn't -- some people wouldn't
5 think it's insulting.

6 Who was trying to speak?

7 MS. DUNN: Sorry, Your Honor. This is Ms. Dunn. I
8 just -- for clarity, because I don't think we want openings --
9 anybody's openings in this case interrupted by many objections,
10 I think we just should bring some clarity to the situation.

11 I don't think anybody expects to jump up in court and
12 say in opening statement, Matthew Heimbach is a Nazi. I do
13 think it is impossible, given the evidence in this case, not to
14 say that you will see evidence of Nazi imagery, that you will
15 see evidence that white nationalists came to Charlottesville.
16 And I think that we very much will say what we intend to prove.
17 And then, you know, I think the jury will see the evidence, and
18 the witnesses will be on the stand for direct and cross. But I
19 think, you know, I just want to bring some clarity to the
20 situation, because part of our responsibility in this case is
21 to prove that the defendants acted with racial animus. So we
22 have to tell the jury that we plan to prove that, and to say
23 you're going to see evidence, and to show them what they're
24 going to see in the case. So that's --

25 THE COURT: Well, I think I've said that that's

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1 appropriate --

2 MS. DUNN: I just want to make sure.

3 THE COURT: -- that you don't say Joe Smith here is a
4 Nazi or some other -- or a neo-Nazi or whatever. I mean, you
5 can say you're going to present evidence of those symbols. I
6 think certain symbols are Nazi symbols. And I don't know how
7 you try the case without --

8 MR. SMITH: I'm fine with what Ms. Dunn said. And I
9 don't mind the term "white nationalist." I don't care about
10 that. It's more the white supremacist, neo-Nazi, or those
11 kinds of terms.

12 THE COURT: I think you're all on the same page here.
13 It just has to be handled at trial if there is any infraction.

14 MS. DUNN: Thank you, Your Honor.

15 MR. SMITH: I just have one more thing, Your Honor,
16 and thank you for being so patient --

17 THE COURT: All right.

18 MR. SMITH: -- with all this stuff. I'm trying to
19 get it all on a list to tell you all at once.

20 THE COURT: Go ahead.

21 MR. SMITH: I was wondering -- and Mr. Bloch is on
22 this call, so I can just ask anyway. I just need to ask: Is
23 it possible that the Court can -- well, I don't know if the
24 Court needs to order it, or if I can just make this request of
25 Mr. Bloch, but I need to get copies of plaintiffs' -- all the

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1 exhibits on plaintiffs' exhibit list, most recent exhibit list.
2 Having not been with this case for a very long time, I'm sure
3 those exhibits are spread all over the case, and I just don't
4 have them. And I really would like to be able to review them
5 so I know what to object to.

6 MR. BLOCH: Judge, this is Michael Bloch for the
7 plaintiffs. I'm happy to call Mr. Smith offline and work this
8 out. I know he's new to the case and getting up to speed, and
9 there's a huge volume of evidence. And I'm happy to --

10 MR. SMITH: Thanks. I appreciate it.

11 MR. BLOCH: -- point him in the right direction.

12 THE COURT: All right. Thank you.

13 MR. SMITH: That's everything, Your Honor. Thank you
14 very much.

15 THE COURT: Anything else?

16 MR. SMITH: That's all. Thank you, Your Honor. I
17 appreciate it.

18 MS. DUNN: Your Honor, from the plaintiffs there are
19 a couple of housekeeping items we just wanted to flag for the
20 Court.

21 THE COURT: All right.

22 MS. DUNN: One is that we're hoping, prior to the
23 start of trial, to get a ruling on the sanctions motion against
24 Mr. Heimbach. So we just wanted to mention that.

25 We wanted to flag for the Court that we -- we have

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1 filed I think yesterday two other motions. One is to exclude
2 Daryl Davis as a witness. And the other, as was mentioned
3 earlier, is a motion to preclude argumentative file names of
4 evidence, since the file names will go to the jury; and also,
5 in that same motion, to exceed the megabyte limit of Box,
6 because some of the exhibits in this case are very big.

7 So we just wanted to flag those for the Court.

8 THE COURT: All right. Okay. We'll -- I'll see if
9 my clerk got that down.

10 MS. DUNN: Then two other things, but I know the
11 Court mentioned at the beginning of this hearing that you may
12 set another Zoom for this week. So we can wait, or happy to
13 bring up those few things now, if there is not going to be a
14 Zoom later this week.

15 THE COURT: Okay. What's the general feeling about
16 another conference during the week? It looks like Wednesday
17 would be the best day for us.

18 MR. SMITH: I think that sounds great, Your Honor.

19 MS. DUNN: Yeah, for the plaintiffs that sounds
20 wonderful, and we appreciate Your Honor's willingness to do it.

21 THE COURT: Okay. Let me check to see what would be
22 a good time. Excuse me just a minute.

23 Okay. Would 9:30 Wednesday be okay?

24 MS. DUNN: Yes for the plaintiffs, Your Honor.

25 MR. SMITH: Yes, Your Honor, that's great.

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1 THE COURT: We may have -- we may be able to take up
2 some of the motions on Wednesday that --

3 MR. KOLENICH: Your Honor, it's Jim Kolenich. I'm
4 not available Wednesday at 9:30.

5 THE COURT: You're not?

6 MR. KOLENICH: No, sir.

7 THE COURT: Are you available any time Wednesday?

8 MR. KOLENICH: Yes, sir, any time from 11:30 forward.

9 THE COURT: All right. How about 1:00 with everyone
10 else?

11 MR. SMITH: That's great, Your Honor.

12 MS. DUNN: Yes, Your Honor, for the plaintiffs that
13 works. Thank you.

14 MR. LEVINE: Your Honor, Wednesday at 1 p.m?

15 THE COURT: Yes. Is that okay?

16 MR. LEVINE: I think Mr. Bloch should check with
17 Ms. Kaplan. I'm not sure Wednesday afternoon works for her or
18 for me. I don't have to be in attendance unless Your Honor
19 proposes that we argue the motion as to --

20 THE COURT: I'm sorry, I'm not sure who's speaking,
21 and you're breaking up.

22 THE REPORTER: This is the court reporter. I'm
23 having trouble hearing you as well.

24 MR. SANCHEZ: Your Honor, it was Alan Levine
25 speaking. He was saying he may not be able to attend on

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1 Wednesday, but his presence is not needed unless Your Honor
2 wants argument on Tubbs's conviction, which we did not argue
3 today because Jones was not present.

4 THE COURT: Okay. All right. We will not hear
5 argument on the conviction.

6 MS. DUNN: Thank you, Your Honor.

7 THE COURT: All right. Heidi, is there anything we
8 can do -- have a bigger file size for the Box?

9 THE CLERK: Your Honor, they simply need to say
10 Exhibit 1 exceeds 50 megabytes. They just need to do Exhibit
11 1A, 1B, 1C until it meets the requirements. Box cannot take an
12 exhibit over 50 megabytes. It won't -- it will not upload
13 properly after the fact. But you just need to break it down in
14 manageable portions, 1A, B, C. Does that make sense?

15 MS. DUNN: Yes. Thank you, Ms. Wheeler.

16 THE CLERK: You're welcome.

17 THE COURT: Okay. Is there anything else this
18 morning?

19 Okay. If not, we'll meet again on Wednesday at
20 1 p.m. Thank you all. I appreciate you being here. We'll
21 recess now.

22 (Proceedings concluded, 10:39 AM)

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C E R T I F I C A T E

I, Lisa M. Blair, RMR/CRR, Official Court Reporter for the United States District Court for the Western District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings reported by me using the stenotype reporting method in conjunction with computer-aided transcription, and that same is a true and correct transcript to the best of my ability and understanding.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Lisa M. Blair

Date: October 19, 2021